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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DAVID CODELL PRIDE, JR.,
12 CDCR #G-39318,

13 Plaintiff,

14 vs.

15 DR. STRAGA,

16 Defendant.
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Case No.: 3:14-0414-JLS-DHB

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS FOURTH
AMENDED COMPLAINT**

(ECF No. 56)

19 David Codell Pride, Jr., (“Plaintiff”), currently incarcerated at the Richard J.
20 Donovan Correctional Facility (“RJD”), is proceeding pro se and in forma pauperis in this
21 civil rights action filed pursuant to 42 U.S.C. § 1983. In his Fourth Amended Complaint
22 (“FAC”), Plaintiff claims Defendant Dr. Straga was deliberately indifferent to his serious
23 medical needs in violation of his Eighth Amendment Rights. Currently before this Court
24 is Defendant Straga’s Motion to Dismiss Plaintiff’s FAC pursuant to Federal Rule of Civil
25 Procedure 12(b)(6). (“Mot.,” ECF No. 56.) On August 8, 2018, Plaintiff filed his
26 Opposition to which Defendant filed a Reply. (“Opp’n,” ECF No. 57; Reply, ECF No. 59.)

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1 Having carefully considered Defendant’s Motion, Plaintiff’s FAC, his Opposition,
2 and Defendant’s Reply as submitted, the Court **GRANTS** Defendant’s Motion to Dismiss
3 Plaintiff’s FAC pursuant to Rule 12(b)(6) (ECF No. 56) based on his failure to state an
4 Eighth Amendment claim upon which section 1983 relief can be granted. Because the
5 Court also finds Plaintiff’s Eighth Amendment claim could not be cured by alleging
6 additional facts, the Court **DENIES** leave to amend as futile.

7 **BACKGROUND**

8 Plaintiff alleges that he is a “patient/prisoner in CDCR’s Extensive Mental Health
9 Program (“EOP”) and is being treated with psychotherapy and psychotropic medications.”
10 *See* FAC at 3. Plaintiff claims he has “several serious medical conditions” including a
11 “ruptured/bulging disc, pinched nerves and chronic care needs for his neck, back, shoulder
12 and knee.” *Id.*

13 On February 24, 2009, Plaintiff began treatment for his medical conditions with Dr.
14 Straga. *Id.* at 4. Plaintiff alleges “for reasons unrelated to ‘medical care,’” Dr. Straga
15 stopped Plaintiff’s prescription for Tramadol which Plaintiff claims was “effective” for his
16 pain management. *Id.* Dr. Straga purportedly told Plaintiff that she was not going to
17 prescribe this medication to Plaintiff due to “alleged abuse of this medicine by ‘other’
18 prisoners.” *Id.*

19 Plaintiff was “eventually placed on the medication Neurontin” but claims that Dr.
20 Straga “should have known that Neurontin is not truly effective for most cases of
21 neuropathy.” *Id.* Plaintiff claims that using this medication for “neuropathic pain” is “off-
22 label” and “there is no evidence/documentation in the medical field to support its use.” *Id.*

23 On the first day that Plaintiff was examined by Dr. Straga, he claims she “asserted
24 that Plaintiff ‘would likely need’ a higher than average dose” of Neurontin due to his
25 weight. *Id.* at 5. Plaintiff “began to notify that the Neurontin was not providing any relief
26 from nerve pain.” *Id.* However, Plaintiff alleges Dr. Straga “disregarded this non-
27 effectiveness of Neurontin and would only increase it” for the following seventeen
28 months. *Id.*

1 Plaintiff claims he “began to have extreme adverse symptoms such as vision
2 impairment, swollen limbs, dizziness, rashes, loss of coordination, etc.” *Id.* Plaintiff
3 alleges that these “symptoms were noticed by a nurse” and this nurse told Plaintiff that
4 these symptoms were “side-effects from the Neurontin.” *Id.* at 5-6. Dr. Straga
5 “discontinued the Neurontin” on July 19, 2010. *Id.* at 6. When Plaintiff notified Dr. Straga
6 of the symptoms, he alleges that Dr. Straga would “prescribe medications like creams,
7 antacids, etc.” *Id.* Plaintiff claims Dr. Straga was deliberately indifferent to his medical
8 needs because “Neurontin labels clearly call for stopping the use if the side-effects Plaintiff
9 developed occurred.” *Id.* at 7.

10 LEGAL STANDARD

11 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss
12 on the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.”
13 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
14 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Bryan v. City*
15 *of Carlsbad*, 207 F. Supp. 3d 1107, 1114 (S.D. Cal. Mar. 20, 2018).

16 Because Rule 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s
17 substantive merits, “a court may [ordinarily] look only at the face of the complaint to decide
18 a motion to dismiss,” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th
19 Cir. 2002), including the exhibits attached to it. *See* Fed. R. Civ. P. 10(c) (“A copy of a
20 written instrument that is an exhibit to a pleading is a part of the pleading for all
21 purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555
22 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426
23 (9th Cir. 1978) (“[M]aterial which is properly submitted as part of the complaint may be
24 considered” in ruling on a Rule 12(b)(6) motion to dismiss). However, exhibits that
25 contradict the claims in a complaint may fatally undermine the complaint’s allegations.
26 *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a plaintiff can
27 “plead himself out of a claim by including . . . details contrary to his claims”) (citing
28 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) (courts “are not

1 required to accept as true conclusory allegations which are contradicted by documents
2 referred to in the complaint.”)); *see also Nat’l Assoc. for the Advancement of*
3 *Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (courts
4 “may consider facts contained in documents attached to the complaint” to determine
5 whether the complaint states a claim for relief).

6 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
7 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
8 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
9 (2007)); *Villa v. Maricopa Cty.*, 865 F.3d 1224, 1228-29 (9th Cir. 2017). A claim is facially
10 plausible “when the plaintiff pleads factual content that allows the court to draw the
11 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556
12 U.S. at 678. Plausibility requires pleading facts, as opposed to conclusory allegations or
13 the “formulaic recitation of the elements of a cause of action,” *Twombly*, 550 U.S. at 555,
14 which rise above the mere conceivability or possibility of unlawful conduct. *Iqbal*, 556
15 U.S. at 678-79; *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013). “Threadbare
16 recitals of the elements of a cause of action, supported by mere conclusory statements, do
17 not suffice.” *Iqbal*, 556 U.S. at 678. While a pleading “does not require ‘detailed factual
18 allegations,’” Rule 8 nevertheless “demands more than an unadorned, the defendant-
19 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
20 555).

21 Therefore, “[f]actual allegations must be enough to raise a right to relief above the
22 speculative level.” *Twombly*, 550 U.S. at 555. “Where a complaint pleads facts that are
23 merely consistent with a defendant’s liability, it stops short of the line between possibility
24 and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citation and quotes
25 omitted); *accord Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc).
26 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual
27 content,’ and reasonable inferences [drawn] from that content, must be plausibly suggestive
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1 of a claim entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d
2 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

3 DISCUSSION

4 I. Eighth Amendment – Inadequate Medical Care Claims

5 Only “deliberate indifference to serious medical needs of prisoners constitutes the
6 unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.”
7 *Estelle v. Gamble*, 429 U.S. 97, 103, 104 (1976) (citation and internal quotation marks
8 omitted). “A determination of ‘deliberate indifference’ involves an examination of two
9 elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the
10 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.
11 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.
12 1997) (en banc) (quoting *Estelle*, 429 U.S. at 104); *see also Wilhelm v. Rotman*, 680 F.3d
13 1108, 1113 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

14 First, “[b]ecause society does not expect that prisoners will have unqualified access
15 to health care, deliberate indifference to medical needs amounts to an Eighth Amendment
16 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),
17 citing *Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat
18 a prisoner’s condition could result in further significant injury or the ‘unnecessary and
19 wanton infliction of pain.’” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at
20 104). “The existence of an injury that a reasonable doctor or patient would find important
21 and worthy of comment or treatment; the presence of a medical condition that significantly
22 affects an individual’s daily activities; or the existence of chronic and substantial pain are
23 examples of indications that a prisoner has a ‘serious’ need for medical treatment.” *Id.*,
24 citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990); *Hunt v. Dental Dept.*,
25 865 F.2d 198, 200-01 (9th Cir. 1989).

26 Here, Dr. Straga does not argue that Plaintiff has failed to allege facts to plausibly
27 show that his medical needs were ‘serious,’ and the Court finds Plaintiff’s FAC is
28 sufficiently pleaded in this regard. *See e.g. Amason v. Wedell*, No. 2:12-CV-0388 KJN P,

1 2014 WL 2987695, at *3 (E.D. Cal. July 1, 2014) (assuming prisoner’s “cellulitis,
2 neuropathy, leg, foot, and ankle swelling and pain” were sufficiently serious medical needs
3 under the Eighth Amendment).

4 Therefore, the Court must next decide whether Plaintiff’s FAC further contains
5 sufficient “factual content” to show that Dr. Straga acted with “deliberate indifference” to
6 his needs. *McGuckin*, 914 F.2d. at 1060; *see also Jett*, 439 F.3d at 1096; *Iqbal*, 556 U.S. at
7 678. “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051,
8 1060 (9th Cir. 2004).

9 While Plaintiff claims Straga “disregarded the non-effectiveness of Neurontin” and
10 provided a “course of treatment” which was “medically unacceptable,” FAC at 6, his
11 pleading lacks the “further factual enhancement” which demonstrates that Dr. Straga’s
12 “purposeful act[s] or failure[s] to respond to [his] pain or possible medical need,” or any
13 “harm caused by [this] indifference.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at
14 557); *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096). Indeed, Plaintiff’s pleading
15 offers only the type of “labels and conclusions” or “formulaic recitation[s] of the elements
16 of a[n] [Eighth Amendment] cause of action that will not do.” *Iqbal*, 662 U.S. at 678 (citing
17 *Twombly*, 550 U.S. at 555.)

18 Inadvertent failures to provide adequate medical care, mere negligence or medical
19 malpractice, delays in providing care (without more), and differences of opinion over what
20 medical treatment or course of care is proper, are all insufficient to constitute an Eighth
21 Amendment violation. *Gamble*, 429 U.S. at 105-07; *Sanchez v. Vild*, 891 F.2d 240, 242
22 (9th Cir.1989); *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir.
23 1985). “Medical malpractice does not become a constitutional violation merely because
24 the victim is a prisoner.” *Gamble*, 429 U.S. at 106; *see, e.g., Anderson v. County of Kern*,
25 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin*, 974 F.2d at 1050; *Broughton v. Cutter*
26 *Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980). Even gross negligence is insufficient to
27 establish deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900
28 F.2d 1332, 1334 (9th Cir. 1990). Instead, Plaintiff must allege that “the course of treatment

1 the doctors chose was medically unacceptable under the circumstances’ and that the
2 defendants ‘chose this course in conscious disregard of an excessive risk to [his] health.’”
3 *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (citations omitted).

4 Plaintiff alleges in his FAC that “there is no evidence/documentation in the medical
5 field to support” the use of Neurontin for his medical condition. FAC at 4. Plaintiff cites
6 to *Smith v. Adam*, 2013 WL 1283478 (N.D. Cal. 2014) to support his contention that
7 “Neurontin provides questionable benefits and can increase the potential harmful side
8 effects for the patient.” *Id.* In *Smith*, the district court, in finding that defendants were
9 entitled to summary judgment on the plaintiff’s Eighth Amendment claims, relied on a
10 declaration of a prisoner’s treating physician in which he stated “that it is CDCR practice
11 ‘to not prescribe medications for off-label use unless there is a documented evidence based
12 need.’” *Id.* at * 3. This treating physician also attached a medical article published in May
13 of 2010 that concluded the “off label” use of Neurontin had “questionable benefit and can
14 increase the potential for harmful side effects for the patient.” *Id.* These facts do not
15 demonstrate that the manner in which Dr. Straga is alleged to have prescribed Neurontin
16 to Plaintiff was “medically unacceptable.” *Hamby*, 821 F.3d at 1092. As the Court
17 informed Plaintiff in the previous Order dismissing his Third Amended Complaint,
18 “Plaintiff’s reliance on this one case sweeps too broadly.” *See* Apr. 10, 2018 Order, ECF
19 No. 51 at 8.

20 The one case Plaintiff cites indicates that there was one medical report in May of
21 2010 indicating that Neurontin may be ineffective for treating Plaintiff’s condition. It does
22 appear that the CDCR restricted the use of Neurontin for use in treating Plaintiff’s
23 condition in 2011. *See Haney v. Nagalama*, No. 11-cv-1218-MCE-CMK-P WL 4482866,
24 at *1 (E.D. Cal. Aug. 20, 2013); *Johnson v. Sepulveda*, No. 11-cv-6693-JST (PR), at *1-3
25 (N.D. Cal. Sept. 23, 2013). Plaintiff alleges that he was prescribed Neurontin from
26 February 24, 2009 to July of 2010. *See* FAC at 5. Plaintiff lists just one study published
27 only three months prior to the time that Dr. Straga stopped prescribing the medication to
28 him to support his claim that Dr. Straga’s treatment of him was medically unacceptable.

1 The CDCR did not restrict the use of Neurontin until after Plaintiff stopped taking the
2 medication.

3 To the extent Plaintiff continues to object to the decision by Dr. Straga to prescribe
4 Neurontin, his difference of opinion still “does not amount to deliberate indifference.”
5 *Snow*, 681 F.3d at 987 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*,
6 680 F.3d at 1122-23. While he has been provided an opportunity to do so, Plaintiff’s FAC
7 still fails to allege facts sufficient to “show that the course of treatment [Dr. Straga] chose
8 was medically unacceptable under the circumstances,” or that she acted “in conscious
9 disregard of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988 (citation and internal
10 quotations omitted). In fact, Plaintiff alleges that he informed Dr. Straga of the side effects
11 he was experiencing due to Neurontin but he also alleges that Dr. Straga would prescribe
12 medication “when Plaintiff notified her of symptoms and continued pain.” FAC at 6. Thus,
13 the Court finds there are no facts that Dr. Straga chose the treatment prescribed to Plaintiff
14 in “conscious disregard of an excessive risk to [Plaintiff’s] health.” *Hamby*, 821 F.3d at
15 1092.

16 Based on the above, the Court finds that Plaintiff’s FAC contains no facts sufficient
17 to show that Dr. Straga acted with deliberate indifference to his plight by “knowing of and
18 disregarding an[y] excessive risk to his health and safety,” or choosing any “medically
19 unacceptable” course of treating his medical condition in conscious disregard to his health.
20 *See Farmer*, 511 U.S. at 837; *Snow*, 681 F.3d at 988.

21 Accordingly, the Court **GRANTS** Defendant Straga’s Motion to Dismiss Plaintiff’s
22 Fourth Amendment Complaint for failing to state a claim upon which relief may be granted.

23 **II. Leave to Amend**

24 Although leave to amend is liberally granted if a pleading can possibly be cured by
25 additional factual allegations, *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995),
26 “[d]ismissal without leave to amend is proper if it is clear that the complaint could not be
27 saved by amendment.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008).

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1 Because Plaintiff has already been granted leave to amend his pleading twice, *see*
2 ECF Nos. 43, 51, the Court finds further amendment would be futile. *See Cervantes v.*
3 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011); *Ferdik v. Bonzelet*,
4 963 F.2d 1258, 1261 (9th Cir. 1992) (finding district court's discretion to deny leave to
5 amend is particularly broad where it has afforded plaintiff one or more opportunities to
6 amend, but to no avail); *Harper v. Schwarzenegger*, 613 F. App'x 648 (9th Cir. 2015).

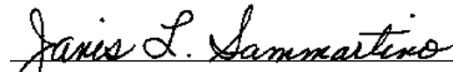
7 **III. Conclusion**

8 Accordingly, the Court **GRANTS** Defendant Straga's Motion to Dismiss Plaintiff's
9 Fourth Amended Complaint for failing to state a claim pursuant to Fed. R. Civ. P. 12(b)(6)
10 (ECF No. 56) and **DENIES** further leave to amend as futile.

11 The Clerk shall enter judgment accordingly and close the file.

12 **IT IS SO ORDERED.**

13 Dated: January 30, 2019

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15 Hon. Janis L. Sammartino
16 United States District Judge
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